No. 154.

Office Supreme Court, U. S.
FILED,
FEB 7 1898
JAMES H. McKENNEY
CLERK

Supp. Brf. of Wolcott & Vaile for P. E.

UNITED STATES OF AMERICA.

Filed Feb. 7, 1898.

IN

THE SUPREME COURT

QUINCY A. SHAW, *Plaintiff in Error.* vs. MURRAY M. KELLOGG, *Defendant in Error.*	No. 154. (16252)

SUPPLEMENTAL BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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UNITED STATES OF AMERICA.

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PRELIMINARY STATEMENT.

This cause was originally brought to this Court upon certificate from the Circuit Court of Appeals for the Eighth Circuit. Printed briefs were submitted upon both sides, and also in behalf of the Government of the United States, and the case was orally argued in December, 1897. At the conclusion of the oral argument an order was made, pursuant to an application made by the parties, that the entire record be certified to this Court, from the Circuit Court of Appeals, and that the

parties be permitted to file additional briefs, and that the case should be submitted upon briefs. Under that order this supplemental brief is herewith submitted.

We understand that the briefs and arguments heretofore filed will be considered by the Court, and that the purpose of the present brief is to supplement, so far as counsel desire, what may have been said in the former briefs, in view of the filing in this Court of a transcript of the complete record.

The references to the record, in our first brief heretofore filed, relate to the transcript of the certificate from the Circuit Court of Appeals. The references in this brief relate to the pages of the transcript of complete record, filed in this Court pursuant to the writ of *certiorari*.

Our original brief contains a general statement of the case, and of the issues involved, and contains the specification of errors. (See former brief, pp. 24–28.)

In the present brief we shall, therefore, confine ourselves to a discussion of certain facts, as developed in the complete record, together with certain further suggestions of law applicable thereto, but invoking the consideration by the Court of those matters fully presented in our former brief.

I.

Events in Chronological Order, Relating to the Title to Baca Grant No. 4.

June 21, 1860. Grant by Congress, to the heirs of Luis Maria Baca, of land equal in quantity to that claimed at Las Vegas. (Printed Record, p. 28.)

Dec. 8, 1860. Certificate as to the acreage of the claim at Las Vegas. (Printed Record, p. 30.)

Dec. 12, 1862. Selection of Grant No. 4 by the agent of the grantees. (Printed Record, p. 32.)

Feb. 5, 1863. Certificate, by Surveyor-General of New Mexico, of the selection of No. 4, and of its acreage. (Printed Record, pp. 31, 32.)

Oct. 3, 1863. Application by claimant of Grant for official survey thereof. (Printed Record, p. 34.)

Nov. 4, 1863. Survey of Grant completed. (Printed Record, pp. 39–51.)

Mar. 15, 1864. Survey and plat thereof approved by Surveyor-General. (Printed Record, p. 52.)

May 4, 1864. Acknowledgment of receipt of plat and map in General Land Office, at Washington, without objection. (Printed Record, p. 53.)

May 18, 1864. Conveyance by the heirs of Baca to John S. Watts. (Printed Record, pp. 53, 54, 58.)

Nov., 1877. Conveyance of the title held by Watts to William Gilpin, by decree of court, pursuant to a contract of date February 17, 1862. (Printed Record, pp. 60-65.)

Dec., 1885. Conveyance by William Gilpin to George H. Adams. (Printed Record, p. 67.)

March, 1887. Conveyance by George H. Adams to Quincy A. Shaw, plaintiff in error. (Printed Record, p. 70.)

II.

FACTS RELATING TO THE OCCUPANCY OF BACA GRANT NO. 4 BY ITS OWNERS.

Oct.-Nov., 1863. Survey of the Grant and establishment of monuments, at each half mile, on its exterior boundaries, except in the extreme mountainous portion, at the northeast corner. (Printed Record, pp. 41, 49, 111.)

1869. Stakes and monuments existed at every half mile, on ten miles of the north side, the entire west side, the entire south side, and nearly five miles of the east side of the square body of land. (Printed Record, p. 76.)

1869. The Grant actually occupied by the the owner thereof, by and through tenants and employees, and continuously from that date to the date of this suit (1893). (Printed Record, p. 76.)

1881. The entire Grant enclosed by a fence, on the north line, from the mountains, west to the northwest corner, thence south to the southwest corner, thence east to the southeast corner, and thence north, nearly five miles, on the east side, into the mountains. (Printed Record, p. 77.)

1881. This fence, with the aid of the mountains in the northeast corner, had the practical effect of making a complete enclosure; persons could not get on to the Grant without crossing the fence, except "by going over the range; a pretty hard trip to get over there; I do not think a man could get over with (*out*) a burro." (Printed Record, p. 85.)

1869-1893. The Grant has all this time been used for a cattle and hay ranch by its owners. (Printed Record, p. 79.)

1877-1893. At least $66,000 has been paid in local taxes, such taxes being paid on the entire Grant. (Printed Record, pp. 77, 85.)

III.

RIGHTS HERETOFORE ASSERTED TO THE POSSESSION OF THE "EASTERN STAR MINE," WITHIN THE BOUNDARIES OF BACA GRANT NO. 4.

April 24, 1876. Alleged discovery of mineral by Francois Herard et al. (Defendant's Answer, Printed Record, p. 8.)

June 16, 1876. Alleged making of location certificate by Francois Herard et al. (Defendant's Answer, Printed Record, p. 9.)

1877. The property abandoned by Herard, because on Baca Grant No. 4. (Printed Record, p. 81.)

1879. This property, leased by the owners of the Grant, to one William Young. (Printed Record, p. 83.)

1879. The property abandoned by lessee, Young. (Printed Record, p. 83.)

Jan. 24, 1883. The property leased, by the owner of the Grant, to a mining company. (Printed Record, pp. 68, 71.)

1885. This property abandoned by the lessee. (Printed Record, pp. 73, 80.)

1887. Verbal lease, by the manager of the Grant, to the defendant in error, Murray M. Kellogg. (Printed Record, p. 74.)

1888. The manager of the Grant refuses a second lease to the defendant in error, Kellogg. (Printed Record, p. 75.)

1890. Invasion of the premises by defendant in error, Kellogg, and ouster of plaintiff. (Verified complaint, Printed Record, p. 2. Testimony of Adams, p. 75.)

IV.

As to the Mineral or Non-Mineral Character of the Land in Controversy.

Dec. 12, 1862. Statement of the original locator of Baca Grant No. 4, that the land is "not mineral." (Printed Record, p. 32.)

Feb. 24, 1863. Surveyor General Case attributes to Gov. Gilpin the *opinion* that the Grant "*would cover* rich minerals *in the mountains*." (Printed Record, p. 33.)

Nov. 28, 1863. Surveyor Sheldon, in surveying the Grant, and examining the same, for purpose of reporting as to the character of lands therein, "saw no indications of the precious metals." (Printed Record, p. 50.)

Dec. 5, 1863. Certificate of Surveyor General Pierce, that the land covered by the Grant "is not mineral." (Printed Record, p. 35.)

Dec. 5, 1863. Certificate by Register and Receiver, that the land covered by Baca Grant No. 4 "is not mineral." (Printed Record, p. 36.)

Dec. 12, 1863. Surveyor-General Pierce shows that numerous miners had prospected this land, and had found no gold. (Printed Record, p. 36.)

Feb. 12, 1864. The Commissioner of the General Land Office, after having refused to permit approval of the selection or survey until satisfied that the land was not mineral, does, after receiving all the evidence called for, authorize approval of the survey. (Printed Record, p. 38.)

Mar. 15, 1864. The Surveyor-General, who is specifically designated by the statute to make the location and survey, and who is authorized by the Act to locate only non-mineral land, does, after investigation, approve the survey and plat. (Printed Record, p. 52 and Plat.)

1876. Alleged discovery of mineral on specific land in controversy, within the exterior boundaries of the Grant. (Defendant's Answer, Printed Record, p. 8.)

1877. This property abandoned by the mineral locator. (Printed Record, p. 81.)

1879. A lessee, holding this property under the owners of the Grant, abandons his lease. (Printed Record, p. 83.)

1885. A subsequent lessee, holding under the owners of the Grant, abandons the leased property. (Printed Record, p. 73.

1886–1887. The present defendant in error, being a lessee under the owners of the Grant, abandoned the property, because, as the lessee understood, he "could not make it pay." (Printed Record, p. 82.)

1890. Defendant in error takes possession of the land in controversy, and holds adversely to his former landlord.

1893. (Beginning of this suit.) Plaintiff in error admits this land to be now known to be mineral in character. (Complaint, Printed Record, p. 2.)

V.

Facts Showing that the Land Department Adjudicated, in 1864, the Question as to the Character of the Land Covered by Baca Grant No. 4.

June 21, 1860. The heirs of Baca were authorized to select, and the U. S. Surveyor-General was authorized to survey and locate, only "vacant land, not mineral;" and this was to be taken in square bodies, each to contain not less than one-fifth of the acreage claimed at Las Vegas, and the selection was to be completed within three years. (Act of Congress, 6th section; Printed Record, p. 28.)

Dec. 8, 1860. The acreage of the claim at Las Vegas was certified to be 496,446.96; thereby showing that the amount to be taken in any single tract, and in a square body, would be 99,289.39 acres. (Printed Record, pp. 30, 32.)

Dec. 12, 1862. The representative of the grantees selects Baca Grant No. 4, and alleges that it is *not mineral*. (Printed Record, p. 32.)

Feb. 24, 1863. The Surveyor-General of Colorado presents facts calculated to raise a suspicion that some of the land *may* be mineral. An issue on this subject is thereby distinctly raised. (Printed Record, p. 33.)

Mar. 13, 1863. The Commissioner of the General Land Office calls the attention of the new Surveyor-General of Colorado to the remark attributed to Gov. Gilpin, and thereupon makes the following requirements:

1. That the application to survey cannot be approved until evidence is furnished that the land is "not mineral." (Printed Record, p. 33.)

2. The character of evidence is designated, to wit: (1) The official certificate of the Surveyor-General to be given "whenever *you* [the Surveyor-General] shall acquire good and satisfactory information that the lands included in the selection are vacant and are not mineral." (2) The certificate of the Register and Receiver to the same effect.

The necessary deductions from this letter are: *First.*—That the Commissioner considered that the law required, not that the land should be taken with a reservation of minerals, but that the selection and survey should include only such lands as were "not mineral." *Second.*—That the mineral or non-mineral character of the lands "included in this selection" should be determined before approval of survey. *Third.*—That the evidence designated by him, if it was to the effect that the land was not mineral, would justify approval of the selection, and its survey.

Nov. 2, 1863. Approval of the contract for survey was refused, by the Commissioner, because there had been no compliance with his requirements of March 13. (Printed Record, p. 35.)

This letter plainly means that the non-mineral character of the lands, included in the selection, must be shown, before the Government will approve the selection or authorize its survey.

Dec. 12, 1863. The Surveyor-General transmitted to the Commissioner his own certificate that the lands were not mineral, but no certificate from the Register and Receiver was sent. (Printed Record, pp. 36–37.)

Jan. 16, 1864. The Commissioner writes: "The evidence furnished by you is not sufficient, in the opinion of this office, to prove that the selection, No. 4, does not cover valuable mineral deposits." "The approval of the selection will *stand suspended* until *some satisfactory proof* is obtained upon the points indicated." (Printed Record, pp. 37–38.)

The necessary inference from this letter is, that approval will be withheld *until* the Commissioner is satisfied, by evidence, of the character designated, that, as a present fact, the selection does not include mineral lands.

Neither this letter, nor any prior letter from the Commissioner, will

Jan. 16, 1864. permit the conclusion that the Commissioner considered that, under the law, he could authorize an approval of a selection which *did* include mineral lands, nor that he could satisfy the requirement of the statute by a reservation of the part which should thereafter be found to be mineral; but, on the contrary, he was constantly insisting that the lands included in the selection should affirmatively appear to be not mineral.

Feb. 1864. After January sixteenth, and before February 12, 1864, Governor Gilpin must have personaliy appeared before the Commissioner with further evidence, for on February twenty-sixth the Commissioner, "at the request of William Gilpin, Esq.," transmits certain documents to the Surveyor-General, and says: "These papers were deposited in this office by Mr. Gilpin." These papers included documents in the nature of evidence as to the non-mineral character of the land, to wit:

1. The certificate of the Register and Receiver, which had not been received on January sixteenth, and the absence of which was then one ground for suspending approval.

2. The field notes of the Sheldon survey, which had never before been submitted to the Commissioner.

These field notes show that the surveyor had carefully traversed the

Feb., 1864. country in the vicinity of the initial point, as he had to ascertain, by original observations, the point where the thirty-eighth parallel of latitude crossed the base of the range. From this point he had gone eastward into the mountains, until further progress was impossible: "The mountain in front of us is utterly impracticable. In our immediate presence is a precipitous wall of granite; and from this point to its crest there is a succession of such, only higher and more difficult."

These field notes also show that the surveyor, after tracing the boundary to the northwest corner and thence to the southwest corner, and thence to the southeast corner of the Grant; went north on the east line into the mountains, to a point nearly five miles north of the southeast corner, ascending a steep mountain to the "summit of ridge, 1,000 feet above the plain." "From this point to the northeast corner of the Grant the mountains are very rugged, precipitous and covered with snow." (Printed Record, p. 49.)

The "general description" given by the surveyor, shows that he made a careful examination of the land within the Grant, containing, in round figures, 100,000 acres. He classifies all this land; the result of his classification (converting square miles into acres) being as follows:

Feb., 1864. "1st rate" land, 40,000 acres. "Good grazing land," 49,760 acres; "extreme mountain portion," 6,400 acres; "sand hills," 3,840 acres. (Printed Record, p. 50.)

These field notes affirmatively show that the surveyor examined the interior of the Grant, and not merely its exterior boundaries. "The Chatillon leaves the mountains at a point nearly equidistant between the north and south boundary lines." "The general course of the mountains is N. 32° west, and in the vicinity of the 'Trois Tetons' and the Chatillon Creeks, their elevation above the park is 6,300 feet."

"The mountains" are composed "mainly of a dense and fine-grained granite, varying to syenite and gneiss." "Near their base is found a very compact conglomerate."

"The creeks are timbered about five miles. There is considerable good pine near the base of the mountains, and firs higher up." (Printed Record, p. 50.)

This surveyor was a deputy under the Surveyor-General, and made the survey as an official survey; and he and his assistants subscribed the official oath.

The defendant in error claims that Mr. Sheldon's survey was a private survey; and counsel for the Government speak of Mr. Sheldon "as a mere employee of Gilpin." The

Feb., 1864. record shows exactly the contrary. The survey was made under the authority of the Surveyor-General, and under instructions given by him. (Printed Record, p. 34.) It was made under oath. (Printed Record, p. 51.) Its approval was authorized by the Commissioner. (Printed Record, p. 38.) It was officially approved by the Surveyor-General. (Printed Record, p. 52.) "The survey was made under the usual guaranties of its accuracy; and the field notes returned to this office for approval under instructions from the General Land Office, dated February 12, 1864." (See official report Surveyor General, included in report of Secretary of Interior, 1864. Printed Record, p. 87.)

This surveyor, having thus carefully and officially examined the land, says:

"Saw no indications of the precious metals or minerals of any kind, unless the presence of iron may be inferred from the fluctuations of the needle shown in the notes." Printed Record, p. 50.)

3. The plat of this survey was one of the papers so submitted to the Commissioner, and which he had not seen on January 16.

This plat showed that only a small portion of the Grant was occupied by the mountains, and that on the slopes of these mountains

Feb., 1864. was found the only timber within the Grant; and that in these mountains was the source of water supply for irrigation of the level lands below. (See plat, Printed Record, p. 52.)

On February 12, 1864, we may justly conclude that the Commissioner had received all the evidence that he had specifically called for, to wit: (1) The Surveyor-General's certificate. (2) The certificate of the Register and Receiver; that he had also supplementary evidence fully covering the requirements of the last clause in his letter of January 16, for he had (3) the plat, field notes, description and statement of a sworn surveyor, who had recently made a detailed examination of the ground. (4) We may also justly conclude that Gov. Gilpin, himself, was examined by the Commissioner, touching the "opinion" attributed to him by Surveyor-General Case. Under the circumstances, theretofore developed, it is unreasonable to suppose that the Commissioner would let Gov. Gilpin escape from his office without examination on this point.

Feb. 12, 1864. The Commissioner of the General Land Office authorizes the Surveyor-General to approve the survey. In doing this the Commissioner said: "The statute does not authorize the

Feb. 12, 1864. issue of a patent. The aforesaid law of twenty-first June, 1860, with your plat, approved in the manner indicated, will, therefore, constitute the evidence of title." (Printed Record, p. 39.)

The necessary deductions from this letter are: (1) That in the opinion, and according to the intent of the Commissioner, the approval by the Surveyor-General would be the final act on the part of the Government, in transferring the title. (2) That if the law had provided therefor, the grantees would then be entitled to receive a patent; but, the law not providing for this evidence of title, its place would be effectually supplied by the granting Act, and the approved plat.

But it is contended that the approval was had with a reservation—"not to embrace mineral land, nor to interfere with any other vested rights, if such exist."

That the Commissioner did not intend by this expression to say that the title would pass, with a *reservation* of such land as should, in the remote *future*, be found to contain mineral, although then supposed to be non-mineral, is conclusively shown by divers circumstances, among which may be mentioned the following:

1. The expression of the Commissioner is fully satisfied by con-

Feb. 12, 1864. fining it to *then known* mining claims, or possessions, if such should be found to exist.

2. That he intended to so confine the expression used by him is apparent by his words, "any other vested rights." There could be no *vested* mineral right in land not then *known* to be mineral. The word "other," by the inexorable rules of language, must carry the idea of "vested rights" back to the mineral land referred to in the same sentence.

3. The Commissioner attributes to the *statute* the "special reservation" which he intends to designate. He does not purport to add any requirement not contemplated by the statute. If the statute makes no such reservation of future discoveries of mineral, then the Commissioner makes none.

4. The Commissioner had no power to impose conditions not in the Act. Any attempt to do so would be *ultra vires*. The Commissioner was not the grantor of the lands; the law must speak for itself.

5. The law making the Grant did not authorize a reservation of lands which might thereafter be found to contain mineral. This contention will be argued in discussing further the law of the case; but the following suggestions may be made here:

(1) The Act does not, in terms, make a reservation from the title

. 12, 1864. to be granted, or make that title subject to forfeiture on account of subsequently disclosed conditions.

(2) It is a grant, as a present fact, of "vacant land, not mineral."

(3) The right of selection was limited to three years. This time was clearly allowed for the purpose of enabling the grantees to find, on the designated portion of the public domain, vacant land, of the character named in the act, and manifestly contemplated that the facts developed within that period of time would show whether the land selected was or was not of the permitted character. The only rational construction of the intent of Congress is that, upon the facts disclosed within the allotted three years, the character of the land should be determined, and if *then* found to be vacant and not mineral, that the title should pass to the grantees.

(4) The statute specifically designated an officer of the Government, to wit: the Surveyor-General, to "make survey and location" of the lands selected. The use of these words, taken in this connection, must mean that the Surveyor-General was not only to officially determine the boundaries of the land, but to confine the selection to the character of land authorized to be taken. His official approval, there-

Feb. 12, 1864. fore, must amount to a decision that the land by him surveyed and located is of the character designated by the statute.

6. To say that the Commissioner intended that the title should pass, subject to forfeiture, to the extent that any of it should thereafter be found to be mineral in character, is to say that no ascertainment or certificate of the then character of the land was at all necessary. If the grantees would in no event obtain title to land then supposed to be non-mineral, but years afterward discovered to contain mineral, then all immediate examination was superfluous. But no such construction can be logically attributed, either to the law itself or to the acts of the Commissioner.

7. The communications of the Commissioner, from July 26, 1860, to January 16, 1864, inclusive, peremptorily insisted upon evidence of the then non-mineral character of the lands covered by the selection. When, on February 12, 1864, he authorizes approval, he thereby says that the evidence furnished has satisfied his mind upon this subject; and by that act he necessarily adjudges the lands selected, surveyed and located, with the necessary acreage, to be of the character prescribed by the Act of Congress.

March, 1864. The plat and survey were, under the authority of the commissioner, approved by the Surveyor-General. The approval of the field notes contains no limitations. The approval of the plat is, "subject to the conditions and provisions of Section 6 of the Act of Congress, approved June 21, 1860."

May 14, 1864. The Commissioner of the General Land Office acknowledged the receipt of the transcript and field notes, and made no objection thereto; and the title evidenced by the Statute and the approved plat has stood unassailed for more than thirty years.

VI.

Adjudication in the Land Office, That the Title to Baca Grant No. 4 Had Passed from the Government and Vested in Private Individuals.

In 1879 the owner of the Grant solicited the issuance of a patent, as evidence of his title. (Printed Record, p. 100.)

Opposition to the issuance of the patent was made, on the ground that the land was then (1879) mineral in character. (Printed Record, p. 101. See also "Baca Float No. 3," 5 Land Decisions, 706, 707.)

The Commissioner of the General Land Office, upon this issue being raised, expressly decided as follows:

"The question as to the mineral or non-mineral character of this land has been passed upon by competent authority. The title has passed from

the Government, and vested in private individuals. This office has no authority to reopen the question. The land cannot longer be regarded as a part of the public domain." (Printed Record, p. 101.)

A subsequent Commissioner reiterated this conclusion:

"You will see by the foregoing, that the land in question was determined in 1864, by the Surveyor-General, whose province and duty it was, to be non-mineral. The location was then perfected, and the title passed." (Printed Record, p. 103; also Printed Record, p. 104.)

VII.

Recognition by the Government, Subsequent to May 4, 1864, That the Title Had Vested in the Grantees.

December, 1864. Report of the Secretary of the Interior, accompanying the annual message of the President to Congress:

"In Colorado Territory, the returns of surveys for the last fiscal year, consist of correction, parallel, township and sectional lines, with fifty miles of private grant, embracing over 431,000 acres of public lands; also 92,292 [?] acres in the fourth location of the Las Vegas Grant, as confirmed by Act of twenty-first of June, 1860, to the heirs of Luis Maria Baca, the premises formerly falling within the limits of New Mexico, but now of Colorado." (Printed Record, p. 87.)

December, 1864. From the report of the Surveyor-General, included in the report of the Secretary of the Interior to Congress:

"During the month of November, 1863, Deputy Surveyor A. Z. Sheldon made a survey of Grant No. 4 of the heirs of Luis Maria Baca, as located

by William Gilpin, attorney for said heirs, under the Act of June 21, 1860. The survey was made under the usual guarantees of its accuracy; and the field notes returned to this office for approval, under instructions from the General Land Office, dated February 12, 1864. That survey *and location* were approved, subject to the conditions and restrictions above referred to." (Printed Record, p. 87.)

Public map issued by the General Land Office in 1864, and accompanying the report of the Secretary of the Interior, showing Baca Grant No. 4 segregated from the public domain. (Original Exhibit No. 22½.)

Certified copy of Government map of date of October 2, 1866, showing Baca Grant No. 4 segregated from the public domain. (Original Exhibit No. 23.)

From the report of the Commissioner of the General Land Office, for the year 1866, at page 104 thereof:

"A small settlement has recently been made near the lake, on Baca Float No. 4, *belonging to Governor Gilpin.*" (Printed Record, p. 88.)

Official map of date of November 5, 1868, showing the segregation of Baca Grant No. 4 from the public domain. (Original Exhibit No. 25.)

August 26, 1867. The Commissioner of the General Land Office issued a certified copy of the map of Baca Grant No. 4, from his office.

January 14, 1868. The Commissioner, in response to another application for patent, stated that the survey and statute are the only authorized evidences of title, but that a grant may be made by law, as well as by a patent pursuant to a law, and that a confirmation by a law is as fully, to all

intents and purposes, a grant as if it contained, in terms, a grant *de novo*. (Printed Record, p. 90.)

May 4, 1868. Joseph S. Wilson, Commissioner, by letter transmitted copies from his office of papers relating to this title, speaking of Claim No. 4 of the heirs of Luis Maria Baca as "confirmed to them under the Act of Congress approved June 21, 1860." (Printed Record, p. 91.)

In the official report of the Commissioner of the General Land Office for 1869, at page 170, it was stated:

"The heirs of Luis Maria Cabeza de Baca, by the Act of June 21, 1860, *were granted*, in lieu of 'Las Vegas Grandes,' which they claimed, the same amount of land contained in the Las Vegas town grant, to be located by them in square bodies, not exceeding five in number. The heirs of Baca have located said Grant, in five square bodies, viz: Nos. 1 and 2, in New Mexico; Nos. 3 and 5 in Arizona, *and No. 4 in Colorado*." (Printed Record, p. 93.)

It was stipulated by counsel, upon the trial, that the Government Map of the United States, printed with the report of the General Land Office for the year 1869, shows the segregation of Baca Grant No. 4 from the public domain; also, that a like map, printed with a like report for the year 1876, shows said Grant segregated from the public domain, and its relation to public surveys. (Printed Record, p. 94.)

March 21, 1879, Commissioner J. A. Williamson declares the title to have passed from the Government to private individuals. (Printed Record, p. 100.)

June 28, 1884. Commissioner N. C. McFarland declares that the location had been perfected, and that the title had passed. (Printed Record, p. 103.)

June 18, 1889. Acting Commissioner W. M. Stone stated that the case had become final, so far as his office was concerned; and quoted from previous decisions to the effect that the title had passed. (Printed Record, p. 104.)

It was stipulated by counsel at the trial, that the Baca Grant had been marked continuously, up to date of the trial, upon the official maps issued by the Land Department of the United States. (Printed Record, p. 143.)

QUESTIONS OF LAW.

The legal rights of the parties, as determined by the statute, and by adjudications of this Court, under similar grants, have been very fully discussed in our original brief, to which we again invoke the attention of the Court; but under the permission of the Court, heretofore granted, we venture to make some supplementary suggestions.

IX.

What Is the Proper Construction of the Sixth Section of the Act of Congress of June 21, 1860, In Its Use of the Words "Vacant Lands Not Mineral?"

Our contention is, that it was the manifest intention of Congress that the question of the mineral or non-mineral character of the land selected, as affecting the validity of the selection, should be determined within the three years allowed by the statute for selection, and that the question would be closed upon approval of survey and location by the Surveyor-General.

It is certainly clear that it was the intention of Congress to give to the heirs of Baca a certain number of acres of land, exactly equivalent in area to the lands they had claimed at Las Vegas. The designation of the character of the lands they were to select, the territorial limits within which it was to be situated, and the time allotted for the selection, all show that the Grant was intended to be an absolute appropriation from the public domain, to be immediately made, and rendered specific by survey. It is unreasonable to suppose that Congress intended that an honest and good-faith selection of apparently non-mineral lands, made within the three years, and surveyed and located by the Surveyor-General, should be defeated, years subsequently, by the discovery that hidden beneath the surface of the earth, there was, in fact, mineral.

If it had been the intention of Congress to grant a specific piece of territory, with a reservation of that portion thereof which should subsequently prove to be mineral in character, it would have been a simple thing, by apt language, to have expressed that idea; to have specifically stated that any selection, survey or location, should not pass title to any land subsequently found to be mineral, but that mineral deposits should, through all the future, be reserved.

The only limitation upon the Grant, however, is that the premises selected shall be vacant lands not mineral. It must have been known by Congress that the area claimed was a large one, from the papers then submitted to it; and when the Act provided that the whole amount should be distributed in not more than five tracts, thereby requiring one-fifth of the whole to be in one body, and when the Act required that each tract selected

should be in square form, certainly the reasonable conclusion is that Congress did not intend to be scrupulously precise as to whether some small fragment of the land selected, within the square body, should, at some subsequent period, be found to contain mineral deposits. Congress certainly intended to grant to the heirs of Baca the full acreage designated, to be taken in the form specified.

Counsel for the defendant in error has called attention to a discussion by this Court in the case of *Mining Co. vs. Consolidated Mining Co.*, 102 U. S., 167, as to the policy of Congress in reserving mineral lands. That discussion, however, as also a like discussion in the case of *Deffeback vs. Hawke*, 115 U. S., 400, discloses the fact that Acts of Congress, previous to the one now under consideration, had been quite specific in designating reservations on account of minerals; as, for example, the Pre-emption Act of 1841 (*5 Stats., 453*), which excepted from pre-emption and sale "lands on which are situated *any known salines or mines*"; while other acts prohibited the *survey* of lands containing mineral. Thus this Court, in the case first cited, speaks of the uniform reservation of mineral lands from *survey*, as well as from sale and pre-emption; and the Court adds:

"It follows, from the finding of the Court and the undisputed facts of the case, that the land in controversy, being mineral land *and well known to be so when the surveys of it were made*, did not pass to the state under the school section grant." (*Ibid.*, 175.)

The quotation we made in our original brief from the case of *Deffeback vs. Hawke*, 115 U. S., 405, follows a general discussion by this Court, through

Mr. Justice Field, of the policy of Congress in its reservation of mineral lands; and yet in that case the Court is very careful to confine such statutory limitations to lands *known at the time* to be valuable for minerals.

When we find this Court saying, in reference to such statutory limitations: "A change in the conditions, occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title, as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale." (*Colorado Coal Co. vs. United States*, 123 U. S., 328;) and again, in speaking of lodes and placers; saying: "The *subsequent* discovery of lodes upon the ground, and their successful working, does not affect the good faith of the application; that must be determined by what was known to exist at the time." (*United States vs. Iron Silver Mining Co.*, 128 U. S., 683;) and when again, we find this Court, in construing provisions as to townsites with a specific reservation as to minerals, saying, as to such statutory provisions: "They are to be read in connection with the clause protecting existing rights to mineral veins; and with the qualification *uniformly accompanying* exceptions in Acts of Congress of mineral lands from grant or sale. Thus read, they must be held, we think, merely to prohibit the passage of title under the provisions of townsite laws to mines of gold, silver, cinnabar or copper, *which are known to exist*, on the issue of the townsite patent, and to mining claims and mining possessions in respect to which such proceedings have been taken under the law or the custom of miners, as to render them valid, creating a property

right in the holder, and not to prohibit the acquisition for all time of mines which then lay buried unknown in the depths of the earth"—(*Davis's Adm'r. vs. Weibbold*, 139 U. S. 518), there seems to be no room for debate as to the proper construction of this statute.

Under these decisions, this statute, passed in 1860, specifically designating an officer of the Government who, on behalf of the Government, was to make survey and location of the lands selected, must be held, in speaking of the character of the land to be selected, surveyed and located, to have reference to the character of land as then known, prior to the final act of appropriation.

We respectfully insist that, whether this Act be construed by itself, under an application of those reasonable rules of construction, by which the true intent of Congress is to be ascertained, or whether we resort to judicial decisions, heretofore made and permitted long to stand in this Court, as to the construction of similar acts, we are bound to come to the conclusion that Congress did not intend to keep open, for all time, the question as to the character of the lands selected and located, but that it contemplated that the title to the lands, as surveyed, should pass when that survey was officially approved.

X.

The Grant Made to the Heirs of Luis Maria Baca, by the Act of Congress, Was a Grant in Præsenti, Which Became Specific and Absolute Upon the Approval of the Official Survey Thereof.

It is to be observed that the original counsel for the defendant in error, in his brief, at page 25,

directly admits that this grant, in its nature, is of the character here stated. Speaking of the case of *Rutherford vs. Greene's Heirs*, he says:

"The act making the grant in that case, *as in this*, was a grant *in præsenti*, and only required an identification and segregation of the land to vest the title; but the vital difference is, that in this case the grant was not applicable to all lands, and could not be located upon mineral land."

The brief purporting to be filed on behalf of the Government takes the opposite position, and, at page 6, contends that this was not a grant *in præsenti*.

The case of *Rutherford vs. Greene's Heirs*, 2 Wheat., 196, cited by us in our original brief, and which has for many years been a leading case in this Court, seems to us conclusive in favor of our contention.

Counsel for the Government attack that case, and sum up the discussion by claiming that the decision of this Court, rendered in that cause, was merely to the effect that the rights granted by the statute "became perfect by the grant which issued under the Act of 1784."

This Court distinctly held in that case, Chief Justice Marshall announcing the opinion, that the *legislative* act "vested a title" in General Greene, for the land mentioned, and that the *survey* "gave precision to that title, and attached it to the land surveyed." (*Ibid*, pp. 205 and 206.)

This Court, in a subsequent case, thus comments on the case of *Rutherford vs. Greene's Heirs:*

"The state of North Carolina, in 1780, passed an act reserving a certain tract of country to be appropriated to its officers and soldiers; and in 1782, after granting 640 acres in the territory reserved to each family that had previously settled on it,

and appointing commissioners to lay off, in one or more tracts, the land allotted to the officers and soldiers, proceeded to enact that 25,000 acres of land should be allotted for and given to Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense the state entertained of the extraordinary services of that brave and gallant officer.

"In pursuance of this law, the commissioners allotted 25,000 acres of land to General Greene, and caused the tract to be surveyed and returned to the proper officer. The manner in which the title originated under which Rutherford claimed, is not very clearly stated in the case. The decision turned altogether on the validity of the title of General Greene, and the date at which it commenced. And the Court said that the general gift of 25,000 acres lying in the territory reserved, became, *by the survey*, a particular gift of the 25,000 acres contained in the survey. And, after examining the title very fully, the Court, in conclusion, say: 'It is clearly and unanimously the opinion of the Court, that the Act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the boundaries allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned March 3, 1783, gave precision to that title and attached it to the land surveyed.'

"There was a further objection taken to the title of General Greene, upon the ground that, by the Constitution of North Carolina, there should be a seal of the state to be kept by the governor and affixed to all grants. And it was objected that this grant by the Legislature had not the formality required by the Constitution to pass the estate. But in answer to this the Court said that this provision was intended for the completion and authentication of an instrument attesting a title previously created by law. That it was merely the evidence of prior legal appropriation, and not the act of the original appropriation itself."

Fremont vs. United States, 17 How., 559.

This Court, later, speaking through Mr. Justice Field, made similar comment upon the case of *Rutherford vs. Greene's Heirs*, adopting it fully; and this Court is quoted as saying:

"It recognizes, as a general principle of justice and municipal law, that such a grant for a certain quantity of land by the Government, to be afterwards surveyed and laid off within a certain territory, vests in the grantee *a present and immediate interest*."

Hornsby vs. United States, 10 Wall., 234.

See, also,

Schulenberg vs. Harriman, 21 Wall., 60.

It will be observed that the words, "are hereby granted," are not used in the grant construed in *Rutherford vs. Greene's Heirs*; nor does the legislative act contain any words of present grant. The words were "*shall be* allotted for and given to;" and Chief Justice Marshall says:

"It has been said, that to make this an operative gift, the words 'are hereby' should have been inserted before the word 'given;' so as to read, 'shall be allotted for and are hereby given to,' etc. Were it even true that these words would make the gift more explicit, which is not admitted, it surely cannot be necessary now to say, that the validity of a legislative act depends, in no degree, on its containing the technical terms usual in a conveyance. Nothing can be more apparent, than the intention of the Legislature, to order their commissioners to make the allotment, and to give the land, when allotted, to General Greene."

2 Wheat., 198.

Counsel for the Government, however, urges that Baca Grant No. 4 was "indemnity" land, and, therefore, subject to those principles which have

been announced in reference to "lieu" or "indemnity" lands, in railroad grants, under certain statutes.

It seems to us that very little argument is needed to show that there is no similarity between this Grant and the railroad grants referred to. The only sense in which the Baca Grants were "indemnity" lands was that they were given in consideration for an equivalent acreage, to which these grantees had asserted title, under the treaty of Guadalupe Hidalgo, at Las Vegas. But the Grant is an affirmative grant of a specific amount of land, to be taken in a square form, within a certain limited territory, and a particular officer of the Government is designated to survey and locate it. No other provision is made for official action, the survey and location by the Surveyor-General being the only designated Governmental action in the premises.

Counsel calls attention to decisions of this Court concerning an act granting lands to aid in the construction of certain railroads in the state of Wisconsin. (13 *Stats.*, 66.) But, in that act, and in other acts of like character, there was a specific provision that the "indemnity" lands selected should be subject to the *approval* of the *Secretary of the Interior*, the language being:

"But, in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of, any sections, or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, *subject to the approval of the Secretary of the Interior*, from the public lands of the United States, nearest to the tier of sections above specified, as much land, in alternate sections or

parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, etc." (See Section 1.)

That act, also, in its 7th Section, expressly provided for the ultimate issuance of patent, after all the terms and conditions of the statute had been complied with.

The Northern Pacific Grant (13 *Stats.*, 365), provided, also, in its 3d Section, that the "lieu" or "indemnity" lands should be selected by the company, under the *direction* of the *Secretary of the Interior*, and that statute also provided that, after the performance of certain conditions, the patent of the United States should issue, as evidence of the transfer of title. (See Section 4.)

So, also, the act relating to the Atlantic & Pacific Road (14 *Stats.*, 292, 295), provided in like manner that the "indemnity" lands "shall be selected by said Company, * * * under the *direction* of the *Secretary of the Interior*." (Section 3.) And by that statute also, the final act of the Government to evidence the transfer of title was to be the Government patent. (Section 4.)

This Court, in the case of *Wisconsin R. R. Co. vs. Price*, 133 U. S., 496, 511, shows that there were many matters to be determined as to the "indemnity" lands referred to, under statutes such as have been referred to, before patent could issue. No title could pass until selections were made, by the agents of the grantee, nor until such selections were approved by the Secretary of the Interior. The statute specifically requiring that the selection should be made subject to the "approval" of the *Secretary*, this Court held that his approval was essential to the efficacy of the selection, and to give to the company any title to the

land selected; that this action was judicial; that he was required to determine, first, whether there was any deficiency in the lands granted, so as to authorize the selection of "indemnity" lands; second, whether the particular "indemnity" lands selected were of a class that could be taken for these deficiencies. In disposing of these two questions, he had to inquire as to whether any lands in the place limits had been previously disposed of by the Government, or whether pre-emption or homestead rights had attached before the line of the road was definitely located. In determining whether a particular section could be taken as "indemnity," the Secretary was obliged to ascertain the condition of the proposed "indemnity" lands; to ascertain whether any portion of them had been appropriated for any other purpose; and until the selections were approved there were no selections in fact—only preliminary proceedings taken for that purpose, and the "indemnity" lands remained, therefore, unaffected in their title. (*Ibid.* pp. 511 and 512.)

How different are these statutes from the one under discussion, where the specific action on the part of the Government is a survey and location by the Surveyor-General, with no other provision for governmental action to define the selection and to complete the transfer of title.

Counsel for the Government, again, call attention to the Act of July 17, 1854, relating to the issue of certificates or scrip to certain persons of the half-breed or mixed blood of the Dakota or Sioux nation of Indians (10 *Stats.*, 304); and counsel cite the decision of this Court in the case of *Carter vs. Ruddy*, 166 U. S., 494, to the effect that this Court held that, under that statute, a patent was necessary to convey the title.

That statute differs from the statute construed

by this Court in the case of *Rutherford vs. Greene's Heirs*, and also differs from the statute now under discussion, under which the plaintiff in error claims, in one very important particular; and that is, that in the Act of July 17, 1854, there is absolutely no provision for any act on the part of the Government, in the acceptance, survey or location of the tracts of land selected by the holders of the scrip. It is a well settled principle that the title of the United States will not pass, as to a specific tract of land, without some action on the part of the Government as to that specific tract of land. Where the grant is by legislative act, a survey under Government authority or adopted as official by the Government, becomes the Government's Act, which gives precision to the title. There was no provision for any such action, in this statute which counsel cited. But in the case at bar, as in the case of *Rutherford vs. Greene's Heirs*, there was a specific provision for the official survey and location, by a designated representative of the Government.

We respectfully insist that the case of *Rutherford vs. Greene's Heirs* is conclusive and controlling on this question, and that this Grant, made to the heirs of Baca, must, under that decision, be considered as a grant *in præsenti*, which vested a title in the heirs of Baca, to which title precision was given by the survey made and approved by the Surveyor-General designated in the Act.

XI.

The Rights of the Heirs of Baca and Their Successors in Interest are the Same as if a Patent Had Issued on May 4, 1864.

We have discussed this subject quite fully in

our original brief; but we venture to make a few additional suggestions:

When the Commissioner, in his letter of February 12, 1864 (Printed Record, p. 38), said: "The statute does not order the issue of a patent. The aforesaid law of twenty-first June, 1860, with your plat, approved in the manner indicated, will therefore constitute the evidence of title," he was either right or wrong on a question of law. If he was right, then the title was, by the approval of the plat, fully transferred from the Government to the grantees, under the Act of Congress; and the final act in the transfer of title had been perfected. If he was wrong, then, by the completion of those acts resulting in this action of the Commissioner, the grantees named in the Act were, from that day, entitled to a patent; the right to such a patent had then become vested in them; and, under well settled principles of law, all their subsequent rights, as between themselves and the Government, or others claiming under the Government, must be considered as if the patent had, in fact, been issued at that time. When the only reason for withholding the patent is that there is no specific provision of law authorizing it, and yet there is a legislative grant, then, manifestly, the *right* of the grantee is not dependent upon the issuance of a patent as evidence of his title, but his right is complete when all other things are done, which the statute does require.

This Court has said:

"The right to a patent once vested is treated by the Government, when dealing with the public lands, as equivalent to a patent issued."

Stark vs. Starrs, 6 Wall., 418.

On the authority of the case last cited, we have argued in our original brief that our right, and, therefore, our title, became perfected when the certificate of the Surveyor-General approving the survey was received by the Commissioner of the General Land Office, and he found no valid objection to it. Counsel for the Government say now that the succeeding clause in this opinion, in some manner, affects our contention. That clause is as follows:

"That is to say, if the Donation Act of 1850 was applicable to the lands, his *right* to a patent became perfect when the certificate of the Surveyor and accompanying proof showed, in the judgment of the Commissioner, a compliance with its requirements. That they were satisfactory to his judgment in this respect follows from the subsequent issue by him of the patent."

Stark vs. Starrs, 6 Wall., 413 and 414.

We do not see the force of counsel's argument. This Court, in the quotation here made, expressly holds that the right to the patent existed when the certificate of the Surveyor and accompanying proof showed, in the opinion of the Commissioner, a compliance with the legal requirements. The clause added simply calls attention to evidence showing the fact of the Commissioner being satisfied, and does not change the rule as to the date when the grantee's rights culminated.

In our case, the Commissioner expressly held that the law did not provide for a patent. He, therefore, could not give evidence of his satisfaction with the proof and of our compliance with the law by that process; he does it equally effectually by another process, and that is; after he had required full proof as to the character of the land selected, as a necessary condition of approval of

the survey, he then, in express terms, authorizes such approval, and, in doing so, states that the approved survey will be the evidence of title. Surely, this shows, with equal certainty, that, in the judgment of the Commissioner, there had been full compliance with the requirements of the law.

Certainly, there is nothing in the quotation made by counsel from the case last cited which, in any way, weakens the force of the decision as an authority in support of our contention.

This Court, in the case of *United States vs. Schurz*, 102 U. S., 378, 402, speaking of the officers of the Land Department, says:

"From the very nature of the functions performed by these officers, and from the fact that the transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceedings their authority in the matter ceases.

"It is equally clear that this period is at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the Government; or, to speak in technical language, the legal title has passed from the Government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title."

Is not this language applicable to the case at bar? The final act was performed in the spring of 1864. As early as May 4, 1864, all proofs had been received by the Commissioner, and all objections made by him had been overcome. The *final act* had been performed after a statement expressly made by him in writing, that the *evidence of title* in

the grantees would be the Act of Congress, and the plat approved by the Surveyor-General.

We respectfully insist, that under well established rules of law, the rights of the plaintiff in error must, at this time, be treated and acted upon in the same manner as if a patent had issued to the heirs of Baca on May 4, 1864.

XII.

The Adjudication of the Land Office, in 1864, to the Effect that the Land Covered by the Grant was not Mineral, is Conclusive.

The proposition that we have just announced would seem to follow as a logical legal result, if the preceding proposition advanced has been established; because, when the final act on the part of the Government is performed, so that the title has passed to the grantees, with all the conclusiveness of a patent, the final act which has this effect is in itself an adjudication that the land surveyed is the very land granted, and of the character designated in the grant.

We have heretofore discussed the facts relating to the adjudication in the Land Office; and it seems to us that these facts, when considered in relation one to another, conclusively show that this land was determined, in 1864, by proper representatives of the Government, to be non-mineral; that the Government was a party to that adjudication, and has ever since been bound thereby.

In our original brief we have presented decisions of this Court as to the conclusive effect of such adjudications; and if our argument hereinabove, and in our original brief made, is sound, that

the rights of the present plaintiff in error are to be considered as if patent had issued, then all those opinions of this Court which refer to the conclusive effect of a patent are authorities for us on this proposition. This Court has said:

"The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed its only, value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the Government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence."

Smelting Co. vs. Kemp, 104 U. S., 640, 641.

We submit that this language is properly applicable to the case at bar. Here, the letter of

February 12, 1864, authorizing the approval of the survey and plat, and expressly stating that these, with the Act of Congress, would constitute the evidence of title, has the same effect of an official declaration that all the requirements preliminary to that letter and direction have been complied with; and we insist that the presumptions attending it are not open to rebuttal in an action at law.

"When the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others."

See Steel vs. Smelting Co., 106 U. S., 451.

This Court, in the *Barden* case, speaking of the determination as to the character of the land, by the Land Department, said:

"The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other, will be considered as conclusive."

Barden vs. Northern Pacific R. R. Co., 154 U. S., 329.

XIII.

The Barden Case.

It has been urged by counsel for the defendant in error that the case of *Barden vs. Northern Pacific R. R. Co.* has made a change in the law, as announced by this Court, as to the proper construction of such an Act of Congress as that of June 21, 1860.

We insist that this contention is not well

founded. This Court, in its opinion, rendered by a majority of the Court, is very careful not to overrule the cases which we have heretofore cited, as to the proper construction of such acts. If we are right as to the effect of the action in the Land Department as being equivalent to a patent to the heirs of Baca, then that final act has been performed which, under the very letter of the *Barden* decision, will close the door to future inquiry as to the character of the land.

We however respectfully call attention to some distinctions between the Northern Pacific grant, which was involved in the *Barden* case, and the Act of June 21, 1860, under which we claim:

1. The Northern Pacific grant was a *donation* by the Government, to aid in the construction of a railroad. The Baca grant was made for a consideration, that consideration being the surrender of a claim which this Government was, by treaty, bound to protect; and the consideration was so exact as to require the precise equivalent of acreage, between the land granted and the land surrendered.

2. In the Northern Pacific case, as this Court has said, the grant included "an imperial domain in land;" while in the Baca grant case, as above suggested, it was but the equivalent, to the very fraction of an acre, of land previously held by the grantees, under a grant by the Government of Mexico.

3. In the Northern Pacific case, the statute expressly provided for a final act on the part of the Government officers, by the issuance of a patent, after many preliminary inquiries, and this final act of the Government had never been performed, at the time when the *Barden* case arose. In the Baca Grant there was no provision for patent, and the

final act provided by statute, for the severance of the land granted, from the public domain, was its survey and location by the Surveyor-General, and that final act was performed more than thirty-three years ago, with the approval of the Commissioner of the General Land Office.

4. In the Northern Pacific case there had been no specific finding that the land in controversy was non-mineral, and the only reliance for any contention as to its non-mineral character, was the return of the Surveyor, in the local Land Office, which, as it would appear from the report, was such return as the Surveyor would make in the general course of his duties, in running the township or section lines, on the public domain, without any special examination of the particular section of land referred to. In the Baca Grant case, however, there was a specific finding as to the non-mineral character of the land, by the very officer, and the only officer, designated by the statute to represent the Government in the location of the land, and this was supplemented by the certificate of the Register and Receiver, under the direction of the Commissioner, and in addition to that, there was a specific official investigation, by a Surveyor sent out for the express purpose of ascertaining and reporting upon the character as well as the boundaries of this selection. It was only after this evidence was submitted to the Commissioner that he authorized the approval of the location and survey.

5. In the Northern Pacific case this Court calls attention to the fact that the Grant was a grant to a railroad corporation. The Court says:

"Grants in aid of railroads (and we speak of *no other grants*), before such determination and

issue of patent, have never been held to pass other minerals than iron or coal."

The Baca Grant was a grant to individuals, by way of confirmation of a specific number of acres, in exchange for lands to which they had previously held title.

6. In the Northern Pacific case, as we understand it, the company had never been in the possession of the land, and had never paid taxes upon it. In the present case, however, the owners of Baca Grant No. 4 have been in possession for thirty years, occupying and improving the land and paying taxes upon it.

7. In the Northern Pacific case, this Court dwelt upon the fact, at the very inception of its argument, that a joint resolution had been passed by Congress, before any rights had accrued under the granting act, expressly providing that "no act passed at the first session of the Thirty-eighth Congress (that being of the year 1864), granting lands to states or corporations to aid in the construction of roads, or for other purposes, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which, in all cases, shall be, and are, reserved exclusively to the United States, unless otherwise expressly provided in the act, or acts, making the grant" (*13 Stats., 567*); and the Court says that this provision should be borne in mind when the statement is made, as it is, that there has been no reservation of mines or minerals to the Government.

On the other hand, the Baca Grant was made in 1860. There had been, then, no specific reservation of minerals, by general law. Reservations, theretofore, had, sometimes in terms, and at other times by clear implication, been confined to known

mines, or known mineral lands; and the very terms of this Grant show that the character of the land was to be determined within a period of three years, allowed for selection.

We respectfully insist, before this Court, that there is nothing in the case of *Barden vs. The Northern Pacific R. R. Co.* which is hostile to the contentions that we are urging in this case; and we insist that a decision in favor of the plaintiff in error in this case, affirming his rights to all the land included within his exterior boundaries, will, in no respect, be inconsistent with the majority opinion in the case of *Barden vs. Northern Pacific R. R. Co.*

XIV.

Plaintiff in Error is the Lawful Owner of the 99,289.39 Acres of Land Included Within His Exterior Boundaries, Even Though the Sporadic Occurrence of Mineral May Now be Disclosed.

This proposition would logically follow from all that has heretofore been said; but we submit, in this connection, that Congress, in granting this land to the heirs of Baca, must have contemplated what the facts in this case show did occur, to wit: that the owners would occupy the land; that it would be the subject of sale and conveyance to subsequent grantees; that it might subsequently be subdivided or improved; that Congress intended to make an actual and definite grant, and not a vague, illusory one, which should remain illusory through all future time, subject to the possibilities of disclosure of mineral which could not, at the time, be discovered.

In this connection we may suggest that the "opinion" attributed to Governor Gilpin in 1862, by Surveyor-General Case, was in the nature of mere gossip. Whether Governor Gilpin ever expressed such an opinion as Surveyor-General Case attributed to him, is a matter not established by proof. If he did entertain such an opinion, the fact nevertheless remains that he was deceived, so far as he ever knew; for he lived to an advanced age, and died without any mineral value having been found on this property. The meagre character of the alleged mineral discoveries made in 1876, as shown by the fact that one lessee after another abandoned the property because no profitable returns could be obtained therefrom, and the fact that there was no pretense of the discovery of mineral, to *any extent*, upon this property, prior to 1876, shows that Governor Gilpin was not justified in entertaining any opinion of mineral value in the property, in 1862.

The fact that the Grant had to be in square form made it almost inevitable that if water rights were to be obtained with it, and any timber, that some portion of the ground should extend into the mountains, and an examination of the field notes of Surveyor Sheldon, and of the plat which was approved by the Surveyor-General, shows that this land was selected for the purpose of its agricultural and grazing facilities, and not on account of mineral possibilities. It is situated in an arid region, where, in order to make it available for pastoral or agricultural purposes, the lands must be irrigated. Nine-tenths of the land is grazing or agricultural in its character. The supply of water for these lands, however, must come from the mountains, and in order to protect that water supply, the owner must control the sources of the

streams. A tract of the size of this Grant would require timber; the great body of the land is upon the level and treeless prairie of the San Luis Valley. The only available timber for the Grant is upon the slopes and along the base of the mountains, in the northeast corner. The mountainous portions, as shown by the survey, include only about one-sixteenth of the whole.

From 1864 down to the present time the Government of the United States has, by many official acts, recognized that this tract of land, as a whole, in square form, had been segregated from the public domain, and that the title thereto had passed from the Government and vested in individuals. All official maps issued since 1864, year after year, show this fact. Official reports of the Surveyor-Generals, and of the Commissioner of the General Land Office, and reports of the Secretary of the Interior, transmitted to Congress, all show the same fact. Certainly, it would be a great violation of the principles of equity, and a great overturning of property rights, to hold that, under these circumstances, there is still reserved, out of the square body constituting the Grant, some uncertain, indefinable extent of land, open to occupation by others; serving as an invitation to trespassers; and leaving, always, as an open question, for the uncertain determination of a jury, whether a given piece of five, or ten, or one hundred acres, is or is not more valuable for mineral than for agricultural purposes.

We respectfully insist that Congress intended that, when this land was surveyed, as *then known*, the grantees should receive the title; and that, under the circumstances of this case, the approval of the survey and plat had the effect of transferring

the title from the Government to the Government's grantees.

We respectfully ask that the decision of the trial Court may be reversed, with proper directions for the future trial of the cause, consistently with this contention.

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